

***In re* Lenora J. Pernell**

Docket No. 00-12

Date of Decision: August 1, 2001

Cite as: *In re* Pernell

Before: Jeffrey S. Gulin, Chair

Stay

Permanent stay

Standard of review

MEMORANDUM AND ORDER

Procedural Background

This matter is before me on remand from the full Personnel Appeals Board (the Board).

Pursuant to 4 C.F.R. §28.133(a), on December 27, 2000, the Board's General Counsel filed a Request for *Ex Parte* Stay claiming that Petitioner's removal may involve one or more prohibited personnel practices and that a temporary stay would allow an opportunity to investigate the allegations. By Order of the same date, the undersigned administrative judge granted the requested stay of 30 days to allow the General Counsel time to investigate the matter. The General Counsel subsequently filed a Request for Further Temporary Stay under 4 C.F.R. §28.133(b), asking for an additional 30-day stay to allow for completion of its investigation and analysis of the case. By Order of January 23, 2001, the temporary stay was extended pending resolution of the Request for Further Temporary Stay. By Order of January 29, 2001, the temporary stay was extended through February 10, 2001, to "allow for the completion of the [General Counsel's] investigation 'in the exercise of a high degree of diligence'."

On February 8, 2001, pursuant to 4 C.F.R. §28.133(b), the General Counsel filed a Request for Permanent Stay requesting that the removal action be stayed until a final ruling on Petitioner's claims. By Order of May 21, 2001, the undersigned administrative judge applied the balancing test required under section 28.133(e) and denied the Request for Permanent Stay. Pursuant to 4 C.F.R. §28.133(f), the General Counsel subsequently appealed to the full Board for review. On July 30, 2001, the Board remanded "so that the Administrative Judge can clarify his position" regarding the section 28.133(e) standard.

Discussion

Requests for permanent stays under 4 C.F.R. §28.133(b) are governed by subsection (e), which requires the presiding administrative judge to:

[C]onsider and balance such established equitable factors as:

- (1) The likelihood that the personnel action sought to be stayed involves a prohibited personnel practice; and
- (2) The nature and extent of the injury that the employee and the agency likely will suffer if the requested stay is or is not issued.

4 C.F.R. §28.133(e).

For the singular purpose of explicating the General Counsel's misplaced reliance upon *Jimenez v. GAO*, 1 PAB 403 (1987) and *Ramey v. GAO*, 1 PAB 177 (1984), I delved into the legislative history of the current stay provisions. While noting similarities between the federal preliminary injunction standard and the current Board provisions, I did not intend to imply that the Board's provisions mirror those of the federal standard, or that legislative history reveals any intent to adopt the federal standard. Indeed, when the Board amended section 28.133(e) in 1993, it clearly did not adopt the federal standard that requires a movant to affirmatively prove likelihood of success on the merits as a condition precedent for obtaining a permanent stay. By stark contrast, section 28.133(e) directs the presiding administrative judge to undertake essentially a three-step analysis as follows:

1. Under section 28.133(e)(1), the judge assesses the quality and quantity of evidence adduced by each side as to the likelihood that the case "involves" a prohibited personnel practice;
2. Under section 28.133(e)(2), the judge assesses the nature and gravity of any harm that could inure to each side if the request for permanent stay is either granted or denied; and
3. Finally, the judge balances these equitable factors against each other in light of the quality and quantity of evidence adduced and then renders a decision.

Under this process, a petitioner could obtain a permanent stay notwithstanding a relatively weak showing under Step 1 *if* she adduces strong evidence of grave harm under Step 2. Likewise, a petitioner could obtain a permanent stay notwithstanding a very weak showing under Step 2 *if* she adduces strong evidence of the likelihood that a prohibited personnel practice occurred. *See* Order of May 21 at 10-11.

In the decision below, on one occasion, I referred to the Step 1 analysis as an assessment of "whether the Petitioner would likely prevail after an evidentiary hearing." Order of May 21 at 7. This unfortunate phraseology apparently caused concern to the full Board. Clearly, section 28.133(e)(1) prescribes no *minimal* evidence test¹ that a petitioner must satisfy before the judge

¹ The regulation does not prescribe any minimal quantum of evidence with respect to either factor. However, as a matter of practicality, it is difficult to envisage a scenario where a petitioner adduces less than substantial evidence (as defined under 4 C.F.R. §28.61(d)) under Step 1, but could nonetheless prevail in her request for a permanent stay.

is permitted to undertake the Step 2 analysis. Again, under Step 1, the judge assesses the likelihood that a relevant prohibited personnel practice occurred, irrespective of the quality and quantity of that evidence, and then proceeds to Step 2. The final decision arises from a balancing of how likely it is that a prohibited personnel practice occurred against how much harm is demonstrated. To be clear and unequivocal, section 28.133(e) does not require a petitioner to prove that she would likely prevail on the merits.

This is the 3-step process I undertook in my Order of May 21, 2001, *see* Order at 9-11, and concluded that, on balance, the Request for Permanent Stay should be denied.